Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

WILLIAM J. BERENS and PHILLIP H. MARTIN, Trustees,

Petitioners,

v.

CWM and ACM, by PAM, and DHM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a trustee is the legal owner of trust property that he must distribute according to trust terms which require beneficiaries to be of actual, biological descent, does a state court violate the trustee's due process rights under the 14th amendment to the U.S. Constitution by holding that the trustee may not inquire concerning whether the biological fact is present but is instead bound by a parentage status determination made by a foreign court in which the trustee had no opportunity to participate?

2. Where a trustee is the legal owner of trust property that he must distribute according to trust terms which require beneficiaries to be of actual, biological descent, does a state court violate the trustee's due process rights under the 14th amendment to the U.S. Constitution by holding that the trustee may not inquire concerning whether the biological fact is present but is instead bound by an "adjudication" of parentage status under a state parentage act when the trustee was not granted standing under that act to participate in any proceedings thereunder?

LIST OF PARTIES

Petitioners William J. Berens (as successor to Robert J. Struyk) and Phillip H. Martin are trustees of three trusts: the JHM 1974 Trust, the 1980 JHM Family Trust, and the 1980 SMC Trust. They appear in this litigation in their capacities as trustees.

Respondents CWM and ACM are minors, and appear in this litigation through PAM, their mother. Along with respondent DHM, they claim beneficiary status under the above trusts.

In addition to the above parties who are listed in the caption, the following persons (beneficiaries of the above trusts whose claims to that status are not at issue) were also parties in the proceedings below:

AMP
DDM
JM
DCM
KMR
SMK

By Orders of the Minnesota Court of Appeals filed on June 25, 2003 and July 21, 2003, the parties were directed to use initials or pseudonyms in their filings when referring to the parties to this matter. Accordingly, the initials used in the Minnesota appellate courts are used in this Petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	ix
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	9
I. The Court Of Appeals Violated The Due Process Guarantee Of The Fourteenth Amendment By Improperly Binding The Trustees To Rulings Made In "Adjudications" In Which They Had No Opportunity To Participate.	10
A. The Trustees Possess a Legal Interest in the Trust Res and a Fiduciary Duty to Uphold the Settlors' Intent.	10
B. The Right to Due Process Under the	

Contents

Page

Fourteenth Amendment Prevents the Court of Appeals from Giving Preclusive Effect For Purposes of Trust Property Distribution to "Adjudications" in Which the Trustees Had No Opportunity to Participate. 13

C. Respondents and the Court of Appeals Incorrectly Used this Court's Decision in *Michael H. v. Gerald D.* to Support the Due Process Violation. 17

II. If Allowed To Stand, The Rule Followed By The Court Of Appeals Will Jeopardize Property Interests In Countless Irrevocable Trusts Across The Nation. 20

CONCLUSION 22

TABLE OF CITED AUTHORITIES

Page

CASES

Baker v. Baker, Eccles, & Company, 242 U.S. 394 (1917) 15, 16

Barton Contracting Co., Inc. v. City of Afton, 268 N.W.2d 712 (Minn. 1978) 6-7

In re Bush's Trust, 81 N.W.2d 615 (Minn. 1957) .. 10

In re Campbell's Trusts, 258 N.W.2d 856 (Minn. 1977) 12

Cleveland Bd. of Education v. Loudermill, 470 U.S. 532 (1985) 6

Coca Cola Co. v. Pepsi-Cola Co., 172 A. 260 (Sup. Ct. Del. 1934) 8

Doerr v. Warner, 76 N.W.2d 505 (Minn. 1956) ... 8

Farmers State Bank of Fosston v. Sig Ellingson & Co., 16 N.W.2d 319 (Minn. 1944) 10-11

First & American National Bank of Duluth v. Higgins, 293 N.W. 585 (Minn. 1940) 11

First Trust Co. v. Northwestern Mutual Life Insurance Co., 283 N.W. 236 (Minn. 1939) 11

Grannis v. Ordean, 234 U.S. 385 (1914) 13

Cited Authorities

	Page
Hansberry v. Lee, 311 U.S. 32 (1940)	15
In re Holden's Trust, 291 N.W. 104 (Minn. 1940)	11
In re Jones' Will, 22 N.W.2d 633 (Minn. 1946)	11
Lehr v. Robertson, 463 U.S. 248 (1983)	12
Lustik v. Rankila, 131 N.W.2d 741 (Minn. 1964)	8
Michael H. v. Gerald D., 491 U.S. 110 (1989)	*passim*
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	13
Northwestern National Bank of Minneapolis v. Simons, 242 N.W.2d 78 (Minn. 1976)	11
Matter of Schroll, 297 N.W.2d 282 (Minn. 1980)	12
Shields v. Barrow, 17 How. (58 U.S.) 130 (1854)	8
State of Washington v. United States, 87 F.2d 421 (9th Cir. 1936)	8
Tice v. American Airlines, Inc., 162 F.3d 966 (7th Cir. 1998)	7
Toombs v. Daniels, 361 N.W.2d 801 (Minn. 1985)	20

Cited Authorities

Page

In re Trust Created by Agreement Dated Dec. 20, 1961, 765 A.2d 746 (N.J. 2001), *cert. denied*, 534 U.S. 889 (2001) 21, 22

In re Trusts Created by Agreement with Harrington, 250 N.W.2d 163 (Minn. 1977) 11

In re Trust Created by Moulton, 46 N.W.2d 667 (Minn. 1951) 11

In the Matter of the Trust Created Under Agreement with McLaughlin, 361 N.W.2d 43 (Minn. 1985) 11

In re Trusteeship Under Agreement with Nash, 122 N.W.2d 104 (Minn. 1963) 20

CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV, § 1 ..... i, 2, 10, 13

STATUTES AND RULES

28 U.S.C. § 1257 1

Cal. Evid. Code § 621 18

Fla. Stat. §§ 61.001 *et seq.* 16

Fla. Stat. § 742.011 16

Cited Authorities

	Page
Minn. Stat. § 257.57, subd. 1	16
Minn. Stat. § 501B.16	4, 5
Minn. Stat. §§ 501B.16 *et seq.*	9
Minn. R. Civ. App. P. 140.01	7
OTHER AUTHORITIES	
Bogert, Trusts & Trustees §§ 181-182 (2d ed. 1979 & Supp. 2003)	20
Restatement (Second) of Trusts § 2 (1959)	11
Restatement (Second) of Trusts §§ 126-128 (1959)	20
Unif. Parentage Act, 9B U.L.A. 295, 377 (2001 & Supp. 2004)	21

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The State Of Minnesota Court Of Appeals Filed February 3, 2004 ..... 1a

Appendix B — Order Of The State Of Minnesota, County Of Hennepin, District Court, Fourth Judicial District, Probate-Mental Health Division Dated And Filed February 12, 2003 ..... 20a

Appendix C — Order Of The State Of Minnesota, County Of Hennepin, District Court, Fourth Judicial District, Probate-Mental Health Division Dated And Filed June 21, 2002 ..... 32a

Appendix D — Order Of The Supreme Court Of The State Of Minnesota Denying Further Review Dated And Filed April 22, 2004 ..... 42a

Appendix E — Judgment Of The State Of Minnesota Court Of Appeals Dated And Entered May 3, 2004 ..... 43a

PETITION FOR A WRIT OF CERTIORARI

William J. Berens and Phillip H. Martin, as trustees of the trusts described in more detail below ("Trustees"), respectfully petition this Court to issue a writ of certiorari to review the decision of the Minnesota Court of Appeals.

OPINIONS BELOW

The decision of the Minnesota Court of Appeals is reported as *In re Trusteeship of Trust Created Under Trust Agreement Dated Dec. 31, 1974, etc.*, 674 N.W.2d 222 (Minn. App. 2004), and is reproduced in the Appendix to this Petition ("App.") at 1a. The order of the Minnesota Supreme Court denying review is unpublished, and is reproduced at App. 42a. The underlying orders of the district court are unpublished, and are reproduced at App. 20a and 32a.[1]

JURISDICTION

The decision of the Minnesota Court of Appeals was announced on February 3, 2004. The Trustees' timely-filed petition for review was denied by the Minnesota Supreme Court on April 22, 2004. Judgment on the decision of the Minnesota Court of Appeals was entered on May 3, 2004. (App. 43a-45a). This Court has jurisdiction under 28 U.S.C. § 1257.

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1. The original orders of the district court used the full names of the parties and were therefore filed under seal in that court and in the Minnesota appellate courts. In the reproduction of the district court orders included in the Appendix, initials have been substituted for names and other identifiers, in accordance with the practice directed by the Minnesota Court of Appeals. *See* page ii, *supra*. The substituted initials are indicated by the use of brackets and are consistent with those used in this Petition and in the decision of the Minnesota Court of Appeals. All text other than the substituted identifiers indicated by brackets is reproduced as in the original documents.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution amendment XIV § 1 provides, in part, "nor shall any State deprive any person of . . . property, without due process of law. . . ."

STATEMENT

The questions presented by this case are whether trustees of a trust are denied due process under the Fourteenth Amendment to the U.S. Constitution when a state court holds that even though the trust terms require them to distribute trust property only to persons of actual, biological descent, they may not inquire concerning whether that biological fact is present but are instead bound by a parentage status determination of a court in a foreign jurisdiction in which they had no opportunity to be heard, or by an "adjudication" under a state parentage law that did not allow them any opportunity to participate. These questions arise from a petition brought by the Trustees in the District Court for Hennepin County, Minnesota, to determine whether DHM, CWM and ACM (hereinafter "Claimants") or their respective issue are beneficiaries of three irrevocable trusts (the "Trusts"), which were established before the births of any of the Claimants.

In 1974, and again in 1980, JHM, as settlor, entered into irrevocable trust agreements and transferred various assets to the trustees thereunder, thus creating the JHM 1974 Trust and the 1980 JHM Family Trust, to be administered under their respective irrevocable agreements. Also in 1980, SMC, KWM, and LMS, as settlors, entered into a separate irrevocable trust agreement and transferred assets to the trustees thereof, creating what is here referred to as the 1980 SMC Trust. These are the Trusts involved in this case.

The Trustees may make discretionary distributions of net income and principal from the 1974 Trust and the 1980 SMC Trust to persons who are the "issue" of JHM, as defined in the trust instruments for those trusts. The Trustees may make discretionary distributions of net income and principal from the 1980 JHM Family Trust to persons who are "issue" of the "issue of the first generation" of JHM, as those terms are defined in the trust instrument for that trust. Each trust agreement contains a definition of the term "issue," the essence of which is the same: In the case of the 1974 Trust, the issue of JHM are "persons who are descended from [him] by legitimate birth to [him]." Appellants' Minn. C.A. App. at 99. In the case of the other two trusts, the issue of JHM are his "lineal descendants . . . except illegitimate descendants." *Id.* at 117, 141.

As noted, the Trusts providing benefits to JHM's "issue" are irrevocable and cannot be amended.[2] JHM is living but physically and mentally incapacitated. He has been married and divorced several times. Six children were born during the course of prior marriages before JHM and PAM married in 1979.[3] DHM and CWM were born to PAM in 1983 and 1985, respectively. In 1986, JHM filed a petition for divorce and alleged that the two eldest Claimants were not fathered by him. That petition was later voluntarily dismissed by JHM,

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2. The terms of each of the Trusts provide: "This agreement and the trust created hereunder shall be in all respects irrevocable and neither I . . . nor any other person shall have any power to modify, amend, or revoke the trust hereunder or this agreement in any respect." Appellants' Minn. C. A. App. at 100, 116, and 140.

3. These six children are current beneficiaries of the Trusts and participated in the proceedings below. *See* page ii, *supra*. They are filing their own Petition for a Writ of Certiorari with this Court.

and he and PAM continued to be married. PAM gave birth to ACM in 1987. In an uncontested Florida divorce proceeding between JHM and PAM in 1991, the two divorced, and JHM stipulated to child support obligations with respect to Claimants. The Trustees were not parties to any of the divorce proceedings; the disposition of the property of the Trusts was not at issue or adjudicated in the divorce proceedings; and no factual finding was made in those proceedings regarding the actual biological relationship between JHM and Claimants.

In December of 1997, the Trustees received credible information that Claimants were not JHM's issue. The Trustees consulted with independent counsel regarding their fiduciary duties in light of this information, and, having been advised that there was a need to make further inquiry, engaged in an investigation. This inquiry produced evidence that PAM had admitted that Claimants were conceived by men other than JHM, that Claimants had current parent-child relationships with their true biological fathers, and that PAM purposefully concealed these facts expressly to obtain (and keep) potentially enormous trust distributions.[4]

The Trustees then filed a petition in the Hennepin County District Court pursuant to Minnesota Statutes Section 501B.16 for instructions to determine the proper beneficiaries

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4. In addition to several millions of dollars of family funds that have gone directly or indirectly to Claimants' benefit based on the belief that the Claimants were JHM's biological children, each of the Claimants has already received in trust for his benefit property valued in excess of $15 million. Appellants' Minn. C.A. App. at 68-69; 73-86; Resp. Trustees' Minn. C.A. App. at 107-125. The collective value of the Trusts here at issue is over $900 million.

of the Trusts.[5] Claimants and PAM appeared in opposition. For the purpose of motions for summary adjudication, *counsel for Claimants and PAM stipulated that, although* Claimants were born to PAM during her marriage to JHM, Claimants in fact "are not the biological children" of JHM. Appellants' Minn. C.A. App. at 18-19.

In two orders, the district court interpreted the trust instruments and held that the beneficiaries of the Trusts included only "persons who are biological descendants of [JHM] or descendants of [JHM] through legal adoption." App. 29a, 40a. The court determined that, since adoption was not a factor here, the youngest three children should not be treated as beneficiaries unless they provided results of DNA testing establishing that they were JHM's biological descendants. App. 22a, 29a.

Claimants appealed. In an opinion addressing what it accurately described as an issue of first impression in Minnesota, the court of appeals reversed. Although it left undisturbed the district court's determination that, by the Trusts' terms, only biological (or adopted) descendants of JHM could be beneficiaries, it held that the Trustees were not allowed to seek instructions or determinations concerning whether the Claimants met that biological requirement for distribution of the Trust property because the Trustees could

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5. Minnesota Statutes Section 501B.16 authorizes a trustee of an express trust to

> petition the district court for an order: . . . (3) to determine the persons having an interest in . . . the trust and the nature and extent of their interests; (4) to construe, interpret, or reform the terms of a trust . . . or (23) to instruct the trustee, beneficiaries, and any other interested parties in any matter relating to the administration of the trust and the discharge of the trustee's duties.

not "challenge a previous determination of paternity made consistent with applicable parentage laws." App. 2a. The court of appeals held that the 1991 divorce decree amounted to such a determination of parentage under Florida law, App. 12a, which was to be afforded full faith and credit by Minnesota courts, App. 14a-15a. The court of appeals also held that the Trustees were similarly bound under Minnesota law, due to a presumption that a man is the biological father of a child born to his wife, which was irrebuttable here since it had not been challenged by those with standing to do so (only the mother, the child, or the presumed father), and so constituted an "adjudication of paternity" binding on the Trustees, even with regard to the Trust property. App. 15a-18a.

The court of appeals so held despite the argument of the Trustees that, because they did not and could not have participated in any "adjudication" of "parentage" under Florida or Minnesota parentage laws, any such "adjudications" made under those laws were not intended to, and could not, apply to govern their disposition of the Trust property.[6]

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6. *See, e.g.*, Resp. Trustees' Br. (to Ct. of App.) at 28 ("preclusion cannot be applied against a non-party, and the Trustees were not (and would not have had standing to be) parties to JHM's Florida divorce proceedings and had no opportunity or ability to litigate the question of the Claimants' biological ancestry"); *id.* at 39 ("Appellants' claims that the Trustees have no standing and are time-barred under the Parentage Act essentially proves the inapplicability of that Act to trust and probate proceedings"). *See also* Br. of Resp. Beneficiaries AMP, DDM, JM, DCM, KMR, and SMK (to Ct. of App.) at 17 ("Due process requires that those whose rights are to be affected be afforded an opportunity to be heard. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542 (1985); *Barton*

(Cont'd)

Since no petition for rehearing is permitted under Minnesota state procedural rules,[7] the Trustees sought review in the Minnesota Supreme Court, arguing that allowing the decision of the court of appeals to stand would deprive them

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(Cont'd)

Contracting Co., Inc. v. City of Afton, 268 N.W.2d 712, 716 (Minn. 1978). In fact, there is a presumption in the law that a nonparty is not bound by a judgment, which presumption stems from due process concerns with the right to be heard and have one's day in court. *See Tice v. American Airlines, Inc.*, 162 F.3d 966, 972-73 (7th Cir. 1998), *reh'g and suggestion for reh'g en banc denied, cert. denied*, 527 U.S. 1036 (1999). ("Any determination of the trust made in a proceeding in which a trustee has no standing constitutes a fundamental denial of due process.").

Similar points were made before the district court. *See, e.g.*, Pet. Supp. Mem. in Support of Motion for Partial Summary Judgment at A-5 ("[R]es judicata and preclusion is never applied against a non-party, and of course the Trustees were not (and could not have had standing to be) parties to the divorce proceeding. Plainly, they never had the ability to litigate the question of the Claimants' biological ancestry."); *id.* at A-7 ("Fundamental principles of law and fairness dictate that parties who are strangers to an action cannot be barred from litigating the issues determined in that action."). Unlike the court of appeals, the trial court honored those fundamental principles by ruling that the Trustees were not bound by "adjudications" in which they had not and could not have participated. *E.g.*, June 2002 Order (App. 39a) ("[T]he trustees were not parties to the [Florida] marriage dissolution proceedings. The trustees do not stand in any privity relationship with [JHM]. The trustees are not bound by the findings of the Florida dissolution proceedings under a doctrine of res judicata or collateral estoppel."); February 2003 Order (App. 23a) ("[I]nquiry into . . . the instant facts was not barred by either Florida or Minnesota law.").

7. "No petition for rehearing shall be allowed in the Court of Appeals." Minn. R. Civ. App. P. 140.01.

of due process,[8] and citing cases in which the Minnesota Supreme Court had previously recognized that the due process right to which the Trustees referred was a fundamental, federally guaranteed right.[9] Claimants responded in part by asserting that this Court's decision in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), had already answered the due process question in their favor. The Minnesota Supreme Court denied the Trustees' petition for review of the decision of the Minnesota Court of Appeals in its Order dated April 22, 2004. App. 42a.

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8. Pet. for Rev. (to S. Ct.) at 4:

> If allowed to stand, [the court of appeals' deprivation of the Trustees' property rights] would be a violation of due process. *See Lustik v. Rankila*, 131 N.W.2d 741, 744 (Minn. 1964) (due process prevents the result of a prior proceeding from binding adversely a litigant who was a stranger to the earlier proceeding and had no opportunity to be heard); *Doerr v. Warner*, 76 N.W.2d 505, 511 (Minn. 1956) ("in the exercise of due process no court, regardless of its jurisdictional structure, may adjudicate directly upon a person's rights without such person being either actually or constructively before the court").

9. *See Lustik v. Rankila*, 131 N.W.2d at 744, citing *Coca Cola Co. v. Pepsi-Cola Co.*, 172 A. 260, 262 (Sup. Ct. Del. 1934), for the proposition stated there that

> [t]he rule that a judgment or decree concludes only parties or privies is based on that fundamental principle that no man can be deprived of his property except by due process of law, a principle which in the United States has been embodied in the Federal Constitution and in the Constitutions of the several States.

(internal citation and quotation omitted); *Doerr v. Warner*, 76 N.W.2d at 511 (noting due process principle as quoted in note 8 above and citing *State of Washington v. United States*, 87 F.2d 421 (9th Cir. 1936), and *Shields v. Barrow*, 17 How. (58 U.S.) 130 (1854)).

REASONS FOR GRANTING THE PETITION

Parentage acts and trust laws serve fundamentally different purposes and interests. It is unfair — and a violation of due process — to bind trustees (the legal owners of trust property) to a decision made in a parentage matter where the trustees had no opportunity to participate and the trust was not even considered.

Adjudications of "parentage" determine a legal relationship status. They serve important interests concerning such matters as the legal responsibilities for child support. To further such interests, 19 states, including Minnesota, have enacted versions of a Uniform Parentage Act, and all states provide for enforcement of divorce decrees including whatever determinations regarding child support they contain.

All states also provide laws for the orderly devolution of property by instruments such as *inter vivos* trusts. As is true here under Minnesota law, trustees of such trusts are the legal owners of the trust property, and have fiduciary duties to distribute that property only to proper beneficiaries, determined according to the settlors' intent as expressed in the trust instruments. Trustees routinely face questions concerning whether persons are in fact trust beneficiaries. With proper notice to all who might have an interest in the trust property, trustees are entitled to obtain guidance for proper distribution in an *in rem* proceeding that binds the trust and all interested parties. *See, e.g.*, Minn. Stat. §§ 501B.16 to .21 (2002).

The questions presented here arise because of what has become a recurring failure of some state courts to honor the

difference between determinations of the legal status of a parent-child relationship and other determinations which turn not on legal status but on the genetic fact of lineal descent, such as those often involved in the devolution of property by trust (or by will). This failure rises to the level of a due process violation when, as here, a determination of legal "parentage" status is made in a status proceeding in which the legal owner of trust property has no right to be heard or participate, but the result of that status proceeding is nonetheless used to bind the disposition of that owner's property. That due process violation has now risen to the level of one which this Court should address because it has occurred repeatedly in different states and is being justified — incorrectly — by reference to this Court's decision in *Michael H.* For these reasons, this petition for a writ of certiorari should be granted.

I. The Court Of Appeals Violated The Due Process Guarantee Of The Fourteenth Amendment By Improperly Binding The Trustees To Rulings Made In "Adjudications" In Which They Had No Opportunity To Participate.

A. The Trustees Possess a Legal Interest in the Trust Res and a Fiduciary Duty to Uphold the Settlors' Intent.

An express trust involves the separation of the legal and beneficial interests in trust property (the *res*), whereby legal ownership of the trust *res* is held by the trustee for the benefit of a beneficiary, who has an equitable interest in the *res* to receive whatever benefits the terms of the trust may confer. *See In re Bush's Trust*, 81 N.W.2d 615, 620 (Minn. 1957); *Farmers State Bank of Fosston v. Sig Ellingson & Co.*, 16

N.W.2d 319, 322 (Minn. 1944). Thus, trustees are the legal owners of the property of the trust with respect to which they are fiduciaries. *See id.*; *First Trust Co. v. Northwestern Mutual Life Ins. Co.*, 283 N.W. 236, 238 (Minn. 1939); *see also* RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).[10]

Trustees in Minnesota and elsewhere are charged with carrying out their fiduciary duties consistent with the original intent of the trust's settlor as set forth in the trust instrument. A court's cardinal purpose in construing a trust instrument is to ascertain and uphold the intent of the settlor. *See In the Matter of the Trust Created Under Agreement with McLaughlin*, 361 N.W.2d 43, 44 (Minn. 1985); *In re Trusts Created by Agreement with Harrington*, 250 N.W.2d 163, 165 (Minn. 1977); *Northwestern Nat. Bank of Minneapolis v. Simons*, 242 N.W.2d 78, 79 (Minn. 1976) (citing *In re Trust Created by Moulton*, 46 N.W.2d 667 (Minn. 1951)). The intent of the settlor is to be ascertained from the language of the trust instrument, which may have a meaning controlled by context and surrounding circumstances. *See First & American Nat. Bank of Duluth v. Higgins*, 293 N.W. 585, 590 (Minn. 1940) (citing *In re Holden's Trust*, 291 N.W. 104, 106 (Minn. 1940)).

Once a settlor's intent has been ascertained, "the trust is to be administered in the manner laid down by him," and "[n]either the court nor a beneficiary or the legislature is competent to violate such intent and to substitute its discretion for that of the trustor [settlor]." *In re Jones' Will*, 22 N.W.2d 633, 634 (Minn. 1946). If, as here, the trust is explicitly made irrevocable and non-amendable, even the

10. The law of Minnesota (the legal situs of the trusts) governs all questions of interpretation and construction of the trust instruments involved here.

settlor cannot thereafter change its terms by his subsequent words or deeds. *See, e.g., Matter of Schroll*, 297 N.W.2d 282, 283-84 (Minn. 1980). The fiduciary duties of a trustee require the trustee to use his or her legal interest in the property of the trust for the benefit of the intended beneficiary or beneficiaries of the trust. A trustee cannot administer a trust for the benefit of persons not intended to be beneficiaries of the trust. *See, e.g., In re Campbell's Trusts*, 258 N.W.2d 856, 860-63 (Minn. 1977).

In this case, the district court made a determination — which the court of appeals did not question — that the terms of the Trusts required beneficiaries to be of actual physical biological descent (in the absence of a legal adoption). *See* App. 29a, 37a-38a, 40a. Thus, by the terms of the Trusts, the Trustees were charged with determining a genetic fact, not a legal relationship.[11] As this Court has acknowledged, "[t]he actions of judges neither create nor sever genetic bonds." *Lehr v. Robertson*, 463 U.S. 248, 261 (1983). Yet the court of appeals deprived the Trustees of the right to dispose of the property of the Trusts in a manner consistent with their fiduciary duty and the settlors' intent, in violation of fundamental due process guarantees.

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11. The Trustees are thus not attacking (and have never attacked) Claimant's legal "parentage." JHM is and remains the "legal father" of the Claimants under the Florida decree and the Minnesota Parentage Act regardless whether they are determined to be eligible beneficiaries under the terms of the Trusts. None of the rights, obligations, or duties now existing between JHM and Claimants (including, among other things, JHM's child support obligations to them) will be affected by a determination that they are not eligible Trust beneficiaries.

B. The Right to Due Process Under the Fourteenth Amendment Prevents the Court of Appeals from Giving Preclusive Effect For Purposes of Trust Property Distribution to "Adjudications" in Which the Trustees Had No Opportunity to Participate.

The right to due process embodied in the Fourteenth Amendment is one of the most basic rights in our system of law and justice.

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "'The fundamental requisite of due process of law is the opportunity to be heard.' . . . This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.* at 314 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

The Florida divorce proceedings were the foundation for the court of appeals' holding:

> Here, the 1991 dissolution decree, as entered into judgment in Florida, stated that JHM was the [Claimants'] father and established JHM's child-support obligations. We observe that JHM had previously stipulated to paternity of the two elder

> [Claimants] when he voluntarily dismissed, with prejudice, his 1986 paternity challenge. We conclude that these acts established JHM's paternity of the [Claimants] in Florida as a matter of law.

App. 12a. The court of appeals concluded that the result of the Florida proceedings was entitled to full faith and credit in Minnesota courts, App. 14a-15a, and that under the Minnesota Parentage Act the Trustees did not have standing to challenge that result, App. 15a-16a:

> We conclude that because JHM's biological paternity of the younger children was previously adjudicated under Minnesota law and because the trustees did not meet the standing and timeliness requirements of the Minnesota Parentage Act, their attempt to challenge the younger children's paternity was not authorized by either Minnesota or Florida law.

App. 17a.

This Court has held, however, that

> when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard

> as are requisite to the due process which the Constitution prescribes.

Hansberry v. Lee, 311 U.S. 32, 40 (1940). "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Id.*

> A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States prescribe, and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires.

Id. at 40-41 (citations omitted). This Court has long held that

> it is now too well settled to be open to further dispute that the 'full faith and credit' clause and the act of Congress passed pursuant to it do not entitle a judgment in personam to extraterritorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound.

Baker v. Baker, Eccles, & Company, 242 U.S. 394, 401 (1917); *see also Hansberry v. Lee*, 311 U.S. at 40-41. The Court in *Baker* added: "This rule became established long before the adoption of the 14th Amendment, as a result of applying fundamental principles of justice and the rules of international law as they existed among the states at the inception of the government." 242 U.S. at 401.

> [T]he effect of the 'due process' clause of [the Fourteenth Amendment was] to establish it as the law for all the states that a judgment rendered against a nonresident who had neither been served with process nor appeared in the suit was devoid of validity within as well as without the territory of the state whose court had rendered it, and to make the assertion of its invalidity a matter of Federal right.

Id. at 403. "The fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard. To hold one bound by the judgment who has not had such opportunity is contrary to the first principles of justice." *Id.* (citations omitted).

Here, the Trustees were never parties to the proceedings to which the court of appeals held them bound with regard to the Trust property. The court of appeals itself acknowledged the fact that trustees are not among those enumerated as having standing to "challenge paternity" under the Florida or Minnesota Parentage Acts. *See* App. 12a-13a (citing Fla. Stat. § 742.011); *id.* at 15a (citing Minn. Stat. § 257.57, subd. 1).[12] Nor are trustees among those given standing to participate as parties to divorce proceedings.[13]

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12. With the Trustees having no standing, the "timeliness" provisions of those Acts — requiring those with standing (i.e., the mother, the child, or the presumptive father) to bring any challenge within a specified time (such as within three years of the child's birth) — although noted by the court of appeals, were moot with regard to the Trustees.

13. *See generally, e.g.*, Fla. Stat. §§ 61.001 to .45 (Florida marital dissolution statutes do not contemplate parties other than spouses, except for the appointment of a guardian ad litem to represent a child in some instances).

Inasmuch as the Trustees had no opportunity to be heard in such parentage or divorce proceedings, the results of such proceedings cannot, consistent with the due process principles described above, be used to bind the Trustees concerning factual determinations for the disposition of property in which they hold the legal interest. Yet that is what the court of appeals did here.

C. Respondents and the Court of Appeals Incorrectly Used this Court's Decision in *Michael H. v. Gerald D.* to Support the Due Process Violation.

In their brief to the Minnesota Supreme Court urging denial of review of the Minnesota Court of Appeals decision, Respondents asserted that this Court had already addressed the due process issues raised by the court of appeals' decision here:

> What petitioners are challenging is the conclusive effect of JHM's acknowledgment of parentage under Florida and Minnesota law. The United States Supreme Court has specifically rejected this argument, holding that even a biological father has no due-process right to challenge paternity. *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989). . . . Certainly trustees and siblings have no such right.

Resp. PAM and DHM's Opp. to Pet. for Further Rev. at 3 (footnote omitted).[14]

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14. The court of appeals also cited and quoted *Michael H. v. Gerald D.*, with respect to the plurality's reference to general public policy considerations supporting state parentage statutes: "that . . .

(Cont'd)

In truth, this Court has not yet addressed the Trustees' argument, let alone rejected it. In *Michael H.*, the Court ruled on a challenge to a state statute (Cal. Evid. Code § 621) which denied standing to a non-husband putative father who wished to establish himself as the child's legal father; at issue was the legal status of the parent-child relationship and the mechanism provided by the state for establishing (or challenging) the same. A plurality of this Court determined that the unwed putative father had no interest — specifically, no traditionally protected "liberty" interest — sufficient to support a due process claim.[15] No property

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(Cont'd)
the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned." *See* App. 18a, quoting 491 U.S. at 119-120. Here, of course, no one disputes that the husband has and will have child support responsibilities (*see* note 11, *supra*), and the "integrity of the family unit" is far beyond salvage: the husband and wife have long since divorced, and the children have stipulated that they "are not the biological children" of the husband (*see* pp. 4-5, *supra*).

15. There was no opinion for the Court in *Michael H.* A plurality determined that the non-husband putative father's challenge to the statute was actually a substantive due process claim, and concluded that neither he nor the child had a constitutionally-protected "liberty" interest in — and thus no due process claim concerning — his unwed "parental" relationship with the child. 491 U.S. at 118-131. The plurality also rejected the child's equal protection claim. *Id.* at 130-132. Justice Stevens, concurring in the judgment, concluded that, although a putative unwed father might have a constitutionally-protected interest, due process was satisfied because Justice Stevens read the state statute as providing the putative father with an opportunity to establish at a hearing that he was an "other person having an interest in the welfare of the child" to whom "reasonable visitation rights" could be awarded in the trial judge's discretion. 491 U.S. at 132-136.

interests held by third parties were at stake. In the present case, no parent-child relationship status is sought to be — or will be — established, disestablished, or otherwise affected. Rather, the sole determinations that must be made are those of genetic fact, and those will determine only whether the Claimants are beneficiaries of the Trusts, eligible to receive distributions of Trust property. Unlike the putative father in *Michael H.*, the Trustees are not challenging their exclusion from a state's determination of the legal status of parentage; they are challenging the use of such a determination, in which they could not participate, to bind the disposition of property of which they are the recognized legal owners. They have a traditionally protected legal interest in that property. They thus have due process rights found not to be present in *Michael H.*, and this case thus presents due process issues the *Michael H.* Court did not purport to reach.

Put another way, in *Michael H.*, the only important interests at stake were parent-child legal relationship status interests. A very divided Court allowed state regulation of those interests by presumption and exclusion over due process and equal protection attacks. *See* note 15, *supra*. Here, traditionally recognized property interests of third parties are being regulated by presumption and exclusion without the opportunity to be heard regarding them. And here, if anything, *Michael H.* ***supports*** a rule that procedural due process principles apply. As one of the several opinions pointed out:

> In a case that has yielded so many opinions as has this one, it is fruitful to begin by emphasizing the common ground shared by a majority of this Court. . . . Five Justices agree that the flaw inhering in a conclusive presumption that

> terminates a constitutionally protected interest without any hearing whatsoever is a *procedural* one. See *infra*, at 153; *post*, at 163 (White, J. dissenting); *ante*, at 132 (Stevens, J. concurring in judgment).

491 U.S. at 136 (Brennan, J., dissenting) (emphasis in original).

II. If Allowed To Stand, The Rule Followed By The Court Of Appeals Will Jeopardize Property Interests In Countless Irrevocable Trusts Across The Nation.

It is a time-honored practice for settlors to limit the devolution of at least some of their property to "blood relatives," and to do so by instructing their trustees to distribute property only to those who are lineal descendants of a specified person — the donor himself or herself, a relative, or someone else. *See, e.g.*, BOGERT, TRUSTS & TRUSTEES § 182 (2d ed. 1979 & Supp. 2003). It is also the long-established law throughout the nation that such instructions will be scrupulously followed. *See, e.g., Toombs v. Daniels*, 361 N.W.2d 801, 808 (Minn. 1985) ("Centuries of common law case law have established the right of a settlor or testator to dispose of his or her property as he or she deems fit."); BOGERT, *supra*, §§ 181-82. Even otherwise weighty legal presumptions regarding identity of beneficiaries are trumped by contrary donative intent. *See, e.g., In re Trusteeship Under Agreement with Nash*, 122 N.W.2d 104, 106 (Minn. 1963) ("Notwithstanding the statement of policy contained in [the Minnesota statute according equal rights to adopted children], the intention of a testator or settlor continues to govern the disposition of his estate if it can be discovered."); BOGERT, *supra*, § 182; *see also generally* RESTATEMENT (SECOND) OF TRUSTS §§ 126-128 (1959).

This well-established law can be thwarted, however, if status determinations made under parentage acts — with very different purposes than the fulfillment of a trust settlor's intent regarding property distribution — are held binding with regard to property devolution. This rises to the level of a due process problem if such determinations are made in actions where those third parties who own the property and seek the fulfillment of the trust's terms were barred from participating.

Yet that is what happened here, and the court of appeals expressly took comfort in noting that "[o]ther courts have reached the same conclusion after applying state parentage acts to facts similar to those before us," App. 18a, citing as an example the decision of the New Jersey Supreme Court in *In re Trust Created by Agreement Dated Dec. 20, 1961* ("*In re Johnson Trust*"), 765 A.2d 746 (N.J. 2001), *cert. denied*, 534 U.S. 889 (2001). In addition to Minnesota and New Jersey, seventeen other states[16] have enacted versions of a Uniform Parentage Act, and all states provide for the enforcement of divorce decree obligations. Moreover, the high likelihood that the due process violation that occurred here will continue to recur in additional states is exacerbated by the fact that this Court's decision in *Michael H.*, which did not consider this issue, is nonetheless being used to justify the practice, *see In re Johnson Trust*, 765 A.2d at 759 (citing *Michael H.* in rejecting due process claim made by beneficiary of trust), yet this Court has thus far declined

16. Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Texas, Washington, and Wyoming all have adopted some version of a Uniform Parentage Act. *See* UNIF. PARENTAGE ACT, 9B U.L.A. 295, 377 (2001 & Supp. 2004) (showing tables of jurisdictions in which versions of a Uniform Parentage Act have been adopted).

review.[17] Given the clearly recurring nature of the problem and the use of this Court's decision to condone it, review by this Court is now warranted to consider and rectify this violation of fundamental due process principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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17. The instant case presents the due process question much more squarely than did the *Johnson Trust* case, where the state court made no finding that the definition of "issue" in the trust instrument showed a clear intent to limit beneficiaries to biologically-related persons. Here, as noted, the district court specifically found that the settlors of the Trusts intended that the beneficiaries be actual biological descendants (or descendants through legal adoption). App. 40a. Thus, the requirement of the trust terms here cannot be rationalized as being really only an inquiry into whether a person has the legal *status* of a child, as it arguably could have been in *Johnson Trust*; here, an actual, physical fact of nature is required.